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NO. 91-66

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

VICTOR STEPHENS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT GRANT CERTIORARI AS TO THE ISSUE REGARDING THE TRIAL COURT'S REJECTION OF THE JURY'S SENTENCE RECOMMENDATION?

A. Should the Court grant certiorari as to this issue where it was not properly raised in the courts below?

B. Should the Court grant certiorari as to this issue where it is precluded by Spaziano v. Florida?

II. SHOULD THE COURT GRANT CERTIORARI AS TO THE ISSUE REGARDING THE JURY INSTRUCTION ON REASONABLE DOUBT?

A. Should the Court grant certiorari as to this issue where it was not properly presented in the courts below?

B. Should the Court grant certiorari as to this issue where it is not worthy of certiorari review?

III. SHOULD THE COURT GRANT CERTIORARI AS TO THE ISSUE INVOLVING THE TRIAL COURT'S REFUSAL TO CHARGE ON A LESSER INCLUDED OFFENSE?

A. Should the Court grant certiorari as to this issue where it was not properly raised in the courts below?

B. Should the Court grant certiorari as to this issue where it is not worthy of certiorari review?

IV. SHOULD THE COURT GRANT CERTIORARI AS TO THE ISSUE REGARDING THE USE OF PEREMPTORY STRIKES AGAINST BLACK JURORS WHERE THIS ISSUE IS NOT WORTHY OF CERTIORARI REVIEW?

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OPINIONS BELOW

The decision of the Court of Criminal Appeals of Alabama affirming petitioner's conviction and death sentence is included as Appendix B to the petition. The decision of the Supreme Court of Alabama affirming the decision of the Court of Criminal Appeals is included as Appendix A to the petition.

JURISDICTION

As to the issue of whether the prosecution discriminated on racial grounds in its use of peremptory strikes, this Court has jurisdiction pursuant to 28 U.S.C. §1257(3). As to the other issues raised, this Court has no jurisdiction because they were not properly raised in the courts below.

CONSTITUTION PROVISIONS INVOLVED

Petitioner claims the violation of his rights under the Fifth Amendment to the United States Constitution, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Petitioner claims the violation of his rights under the Sixth Amendment to

the United States Constitution, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Petitioner claims the violation of his rights under the Eighth Amendment to the United States Constitution, which provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Petitioner claims the violation of his rights under the Fourteenth Amendment to the United States Constitution, which provides in relevant part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted in 1986 for the capital offense of murder during a robbery, stemming from the killing of two elderly men during the robbery of a rural store. Petitioner was convicted of this offense in December 1987. The jury recommended a sentence of life imprisonment without parole. After an independent weighing of the aggravating and mitigating circumstances, the trial court rejected the jury's recommendation and sentenced petitioner to death.

On August 3, 1990, the Court of Criminal Appeals affirmed petitioner's conviction and death sentence. On March 15, 1991, the Supreme Court of Alabama affirmed the decision of the Court of Criminal Appeals.

ARGUMENT

I. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE REGARDING THE TRIAL COURT'S REJECTION OF THE JURY'S SENTENCE RECOMMENDATION.

A. The Court should deny certiorari as to this issue because it was not properly raised in the courts below.

Petitioner asks this Court to consider whether a particular standard is constitutionally required where a trial court rejects a jury's sentence recommendation and imposes a sentence of death. The Court should deny certiorari because this issue was not properly raised in the courts below.

No issue regarding the trial court's override of the jury's recommendation was raised in the Court of Criminal Appeals of Alabama, and

that court did not decide the issue (See Appendix B to the petition). Nor was the issue raised in the petition for writ of certiorari or the supporting brief to the Supreme Court of Alabama (See Appendix A to the response, a copy of said petition and brief). While petitioner did argue that his sentence was improper, he did so only on the ground that the jury's weighing of the aggravating and mitigating circumstances was correct; petitioner did not contend that any particular override standard was applicable and did not even mention the federal constitution or federal law with regard to this argument (See, Appendix A to the response, p. 8-9 of the petition, pp. 29-30 of the brief). The opinion of the Supreme Court of Alabama simply affirmed the decision of

the Court of Criminal Appeals (See Appendix A to the petition).

The jury override issue was first raised in petitioner's application for rehearing to the Supreme Court of Alabama. (See Appendix D to the petition D-90 through D-92). This application for rehearing was denied without an opinion. (See Appendix B to this response, a copy of the notification from the lower court).

In order for this court to have jurisdiction to review the decision of the highest court of a state, a federal question must be distinctly presented below. See, Herndon v. Georgia, 295 U.S. 441, 442-443 (1935); see, House v. Road Improvement District No. 2, 266 U.S. 175 (1929). Questions first presented to the highest state court on application for rehearing generally come

too late for consideration by this Court. Radio WOW Inc., v. Johnson, 326 U.S. 120, 128 (1945). One exception to this rule exists where the state court actually entertains the question and decides it. Henderson v. Georgia, 295 U.S. at 443-444. There is no indication that this occurred here, however, because the Supreme Court of Alabama summarily denied the application for rehearing without an opinion. Such a summary denial does not constitute a reviewable judgment. Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 333-334 (1913). The Court therefore should deny certiorari.

B. The Court should deny certiorari as to this issue because petitioner's argument is precluded by Spaziano v. Florida.

Petitioner asks this Court to decide whether the jury override standard of Tedder v. State, 322 So.2d 908 (Fla. 1975), is constitutionally required. The Court should deny certiorari because petitioner's argument is precluded by Spaziano v. Florida, 468 U.S. 447 (1984).

In Spaziano the Court considered whether a trial judge could under any circumstances override a jury's recommendation of life imprisonment. The Court held that there was no constitutional right to a jury's participation in capital sentencing, and thus that a jury's decision could be overridden.

Under Spaziano, the State of Alabama could eliminate entirely the jury's role in sentencing. Petitioner

has no logical argument that any particular standard for overriding a jury's recommendation is constitutionally required.

For the above reasons the petition is due to be denied as to this issue.

II. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE REGARDING THE JURY INSTRUCTION ON REASONABLE DOUBT.

A. The Court should deny certiorari as to this issue because it was not properly presented in the courts below.

Petitioner asks this Court to consider whether the jury charge regarding reasonable doubt violated due process. The Court should deny certiorari because this issue was not properly raised in the courts below.

No issue regarding the jury charge was presented to the Court of Criminal Appeals of Alabama, and that court did not decide the issue. (See Appendix B to the petition). Nor was the issue raised in the petition for writ of certiorari to the Supreme Court of Alabama. (See Appendix A to this response, a copy of said petition and supporting brief). The opinion of the Supreme Court of Alabama simply affirmed the decision of the Court of Criminal Appeals. (See Appendix A to the petition).

The jury charge issue was first raised in the Alabama appellate courts in petitioner's application for rehearing to the Supreme Court of Alabama. (See Appendix D to the petition, D-90 through D-92). This

application for rehearing was denied without an opinion. (See Appendix B to this response, a copy of the notification from the court).

Petitioner cannot argue that Cage v. Louisiana, 59 U.S. L.W. 3361 (November 13, 1990), the case upon which he relies, was decided so recently that he could not have raised the issue before the Alabama Supreme Court. While petitioner's brief and petition were sent to the Supreme Court of Alabama on October 5, 1990, his case was not decided by that court until March 15, 1991, more than four months after the Cage decision. Petitioners made no attempt, by supplemental brief or otherwise, during this period to bring Cage to the attention of the Alabama Supreme Court. Petitioner thus

cannot claim that the timing of the Cage decision prevented him from presenting this issue properly.

In order for this Court to have jurisdiction to review the decision of the highest court of a state, a federal question must be distinctly presented below. See, Herndon v. Georgia, 295 U.S. 441, 442-443 (1935); See House v. Road Improvement District No. 2, 266 U.S. 175 (1924). Questions first presented to the highest state court on application for rehearing generally come too late for consideration by this Court. Radio WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945). An exception to this rule exists where the state court actually entertains the question and decides it. Herndon v. Georgia, 295 U.S. at 443-444. There is no

indication that this occurred here, however, because the Supreme Court of Alabama summarily denied the application for rehearing without an opinion. Such a summary denial does not constitute a reviewable judgment. Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 333-334 (1913). The Court should therefore deny certiorari.

B. The Court should deny certiorari as to this issue because it is not worthy of certiorari review.

Petitioner asks the Court to review the jury charge herein light of Cage v. Louisiana, 59 U.S.L.W. 3361 (November 13, 1990). In so doing, petitioner requests no modification or clarification of Cage; he simply

requests the Court to apply Cage in a straightforward manner.

This Court is well aware of the relentless demands on its time to decide questions of first impression which have far-reaching impact. Petitioner asks instead for an application of settled law. This death penalty case will undoubtedly be reviewed by numerous other courts. The Court should deny certiorari and leave the issue of whether Cage requires reversal here to the lower courts.

III. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE INVOLVING THE TRIAL COURT'S REFUSAL TO CHARGE ON A LESSER INCLUDED OFFENSE.

A. The Court should deny certiorari as to this issue because it was not properly raised in the courts below.

Petitioner asks the Court to consider whether the failure to charge on a particular lesser included offense is contrary to Beck v. Alabama, 447 U.S. 625 (1980), and Schad v. Arizona, 59 U.S.L.W. 4762 (June 21, 1991). The Court should deny certiorari because this issue was not properly raised in the courts below.

No issue regarding lesser included offenses was raised in the Court of Criminal Appeals of Alabama, and that court did not decide the issue (see

Appendix B to the petition). Nor was the issue raised in the petition for writ of certiorari or the supporting brief to the Supreme Court of Alabama (see Appendix A to this response, a copy of said petition and brief).

The lesser included offense issue was first raised in petitioner's application for rehearing to the Supreme Court of Alabama (see Appendix D to the petition, D-92 through D-95). This application for rehearing was denied without an opinion (see Appendix B to this response, a copy of the notification from the lower court).

In order for this Court to have jurisdiction to review the decision of the highest court of a state, a federal question must be distinctly presented

below. See, Herndon v. Georgia, 295 U.S. 441, 442-443 (1935); see, House v. Road Improvement District No. 2, 266 U.S. 175 (1924). Questions first presented to the highest state court generally come too late for consideration by this Court. Radio WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945). An exception to this rule exists where the state court actually entertains the question and decides it. Herndon v. Georgia, 295 U.S. at 443-444. There is no indication that this occurred here, however, because the Supreme Court of Alabama summarily denied the application for rehearing without an opinion. Such a summary denial does not constitute a reviewable

judgment. Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 333-334 (1913).

Nor can petitioner argue that the issue was not raised earlier because his claim became apparent only Schad was decided. Schad is an application of the earlier decision of Beck v. Alabama, supra, decided long before petitioner's trial.

For this reason the petition as to this issue should be denied.

B. The Court should deny certiorari as to this issue because it is not worthy of certiorari review.

Even if the lesser included offense issue were before the Court for consideration, review should be denied

because, for several reasons, this case is not worthy of certiorari review.

The first reason is that petitioner simply asks for a straightforward application of Beck and Schad. This Court is well aware of the demands in its time to consider issues of first impression which affect a whole range of cases. The issue here is clearly not such an issue. The decision on petitioner's claim is thus best left to the lower courts.

A second reason is that petitioner's argument is precluded by Hopper v. Evans, 456 U.S. 605 (1982). Petitioner's main contention is that he was due a charge on felony murder because his shooting of two elderly men was "unintentional." By unintentional

petitioner evidently means that it was in response to one of the men shooting at him in defense. This theory of an "unintended" killing was specifically rejected in Hopper.

Nor should the Court consider petitioner's suggestion to vacate and remand the case for reconsideration in light of Schad. First of all, as was argued above, the Court has no jurisdiction because the lesser included offense issue was not raised below. Second, Schad did not expand Beck in a way that would justify reconsideration. Instead, Schad generally limited Beck to situations where the jury has a choice only between a capital charge and acquittal. In this case the jury was also instructed on intentional murder,

a non-capital crime, as a lesser included offense (R. 838, 845-847).

For the above reasons the Court should deny certiorari as to this issue.

IV. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE REGARDING THE USE OF PEREMPTORY STRIKES AGAINST BLACK JURORS BECAUSE THIS ISSUE IS NOT WORTHY OF CERTIORARI REVIEW.

Petitioner asks the Court to review whether the trial court abused its decision in accepting the prosecution's race-neutral reasons for its strikes of black jurors. The Court should deny certiorari because this issue is not worthy of certiorari.

The Court has recently held that the trial court's decision on whether there is racial discrimination in jury selection will be reversed only upon a

finding of an abuse of the trial court's discretion. Hernandez v. New York, 59 U.S.L.W. 4501, 4505 (May 28, 1991). The petition presents only the question of whether, under the particular facts here, the trial court abused its discretion. The Court is well aware of the demands on its resources to decide cases of far-reaching impact. The case at bar is clearly not such a case. For this reason the Court should deny certiorari.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES H. EVANS
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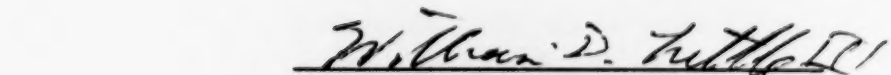

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CERTIFICATE OF SERVICE

I, William Duncan Little, III, a member of the Bar of this Supreme Court Court of the United States, do hereby certify that on this _____ day of August, 1991, I did serve three copies of the foregoing brief and appendix upon counsel for petitioner, by placing said copies in the United States Mail, first class postage prepaid and addressed as follows:

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